



Montana Legislative Services Division
Legal Services Office

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July 11, 2019

Erica Siaté
641 W. Silver Street
Butte, MT 59701

Re: Review of Proposed Statutory Initiative to Legalize and Regulate Marijuana in the State of Montana

Dear Ms. Siaté,

On June 28, 2019, the Legislative Services Division received the text of your proposed statutory initiative to legalize and regulate marijuana. To the extent possible given the limitations discussed below, I reviewed the text of the initiative pursuant to 13-27-202, MCA, for clarity, consistency, and other factors normally considered when drafting proposed legislation. This letter constitutes the Legislative Services Division's review of your proposed statutory initiative.

Section 13-27-201(2), MCA, requires the text of an initiative to be in the bill form provided in the most recent issue of the Bill Drafting Manual furnished by the Legislative Services Division. Section 13-27-202(2)(a), MCA, requires both the text of the initiative and the ballot statements to conform to the Bill Drafting Manual, which is available on the Legislative Branch website at: <http://leg.mt.gov/css/For-Legislators/Publications/default.asp>.

The Bill Drafting Manual requires a drafter to utilize the current MCA section text when amending existing statutes, and in "a section containing existing statute text, new language must be shown as underlined and deleted language must be shown as stricken." Section 1-6, 2, Bill Drafting Manual (2018). In addition, the Bill Drafting Manual requires a drafter to cross check the internal references for references to each amended section to ensure that additional sections do not need to be amended. Section 1-6, 3, Bill Drafting Manual (2018).

Sections 56 through 70 of the submitted initiative propose amendments to existing statutory sections. However, none of the additions are indicated with underlining and none of the deletions are indicated with strikethroughs. For this reason, I am unable to perform my function as reviewer with respect to these sections. Similarly, a citizen attempting to understand the purpose of the initiative would likewise not be able to determine what was being changed by the proposed amendment.

Moreover, the initiative proposes amendments to the following MCA sections that were also amended during the 2019 legislative session: 15-64-102, 17-7-502, 50-32-222, 50-46-302, and 80-18-111, MCA. Because the revision of the most recent datastore (including both amended and new sections) will not be available until after the revisions to these sections are codified by the Legislative Services Division, it will be impossible to accurately and comprehensively amend the appropriate statutes to effectuate your proposal.

Because (1) any attempt to suggest revisions to your draft will necessarily be inaccurate and untimely until after the statutory changes by the Legislature during 2019 are codified in the new datastore and (2) the amendments in Sections 56 through 70 do not show new language as underlined and existing language as stricken, I am unable to complete a comprehensive review at this time. Please resubmit your initiative draft with the current statutory language after codification has been completed, and be sure to indicate new language as underlined and existing language as stricken. In addition, it would be very helpful if your resubmittal included an editable electronic version of the initiative. As mentioned in several places below, many of the sections contain minor issues with organization, style, numbering of subsections and cross-references, and general consistency with the Bill Drafting Manual. I would request that you submit the next draft in an editable format so that I can provide suggested corrections in redline form, rather than re-typing entire sections to provide feedback.

Although I will not be able to perform a comprehensive review until receiving the resubmitted initiative, I do want to provide feedback at this time regarding several potential substantive issues that you may wish to address in the resubmitted draft.

I. Considerations for Statement of Purpose and Implication

The text of the proposed ballot issue and the draft ballot issue statements must comply with 13-27-312, MCA. Ballot statements include: (1) the statement of purpose and implication, which may not exceed 135 words; and (2) the yes and no statements. Pursuant to 13-27-312(4), MCA, the statement of purpose "must express the true and impartial explanation of the proposed ballot issue in plain, easily understood language". In addition, the statement of purpose may not be argumentative or written in a manner that creates prejudice for or against the issue. While it is not always feasible to include a complete explanation of each part of a ballot issue in the statement of purpose, the statement must at least explain both the purpose and implication of the ballot issue in easily understood, nonargumentative language. See *Mont. Consumer Fin. Ass'n v. State*, 2010 MT 185, ¶ 12.

Unless altered by a court pursuant to 13-27-316, MCA, the statement of purpose becomes the title for the ballot issue that is circulated to the electorate and the ballot title if the ballot issue is placed on the ballot. However, proponents of a ballot issue are not entitled "to the ballot statements of their choosing", and the Attorney General and, if necessary, the Supreme Court may alter proposed statements of purpose and implication to comply with the provisions of 13-27-312, MCA. See *Mont. Consumer Fin. Ass'n v. State*, 2010 MT 185, ¶ 11.

It is not clear whether the existing title is intended to function as the statement of purpose and implication. Assuming that it is, the statement complies with the 135-word limit. You may wish to consider including details such as the tax rates, the programs selected to receive tax revenues, etc.

II. Considerations for Statutory Initiative

General note: The Montana Constitution, Article II, section 14, states that “[a] person 18 years of age or older is an adult for all purposes, except that the legislature or the people by initiative may establish the legal age for purchasing, consuming, or possessing alcoholic beverages.” If passed as currently drafted, the initiative would be vulnerable to invalidation on the basis that it deprives 18-year-olds from the rights to possess, use, grow, etc. marijuana that are afforded to individuals 19 years of age or older pursuant to this initiative.

Potential solutions to this issue would include making the initiative applicable to all individuals 18 years of age or older or concurrently submitting a constitutional amendment to Article II, section 14, to include marijuana in the exception clause. In the event that you choose to keep the age as 19, I would note that for the purpose of consistency, “18” should be changed to “19” in the following places: Section 4, subsection (2)(d)(iii) and subsection (3)(c)(iv); and Section 33, subsection (4).

Section 8: Section 8, subsection (8) may present a conflict with the commerce clause of the federal constitution, which prohibits state laws that unduly restrict interstate commerce. A very recent United States Supreme Court case, *Tennessee Wine & Spirits Retailers Association v. Thomas*, 2019 U.S. LEXIS 4399 (opinion issued June 26, 2019) held that a 2-year residency requirement applicable to all retail liquor store license applicants in the state of Tennessee violated the commerce clause. The ruling came in spite of Section 2 of the Twenty-first Amendment granting the states “latitude with respect to the regulation of alcohol” and the state’s arguments that the residency requirement was intended to protect public health and safety and promote responsible alcohol consumption.

The residency requirement in this Section 8, subsection (8) could similarly be interpreted as intended to shield state residents from out-of-state competition and be invalidated on that basis.

Section 9: This section contains minor errors in style and/or subsection and cross-reference numbering. If you include an editable version of the draft with your resubmittal, I would be able to redline suggested fixes for these errors.

Section 10: This section appears to be in draft format. In order to conform to Montana’s bill drafting style conventions, consider substituting something similar to the following:

NEW SECTION. Section 10. Timeline for issuance of licenses: The department will issue licenses to applicants meeting the requirements set forth in [section 9] in accordance with the following schedule:

- (1) Between January 1, 2021, and June 30, 2021, licenses may only be issued to an applicant if the applicant entity or a controlling person in the applicant’s entity holds a current and valid license under the Montana Medical Marijuana Act.
- (2) Between July 1, 2021, and December 31, 2021, licenses may only be issued to

applicants eligible under subsection (1)(a) and:

(a) to an applicant if the applicant entity or a controlling person in the applicant entity has previously held a license under the Montana Medical Marijuana Act; or

(b) to an applicant if the applicant or a controlling person in the applicant entity has previously been convicted under 45-9-102 for possession of marijuana, so long as the convicted individual owns and is entitled to the profits from at least 51% of the entity applying for a license.

(3) On or after January 1, 2022, licenses may be issued to applicants meeting criteria to be determined by the advisory committee established in [section 4].

Section 11: Substantively, consider removing “and personal production” from the end of the first sentence. This initiative does not contemplate licensing of personal production.

In addition, this section contains minor errors in style and/or subsection and cross-reference numbering. If you include an editable version of the draft with your resubmittal, I would be able to redline suggested fixes for these errors.

Sections 18 and 19: These sections contain minor errors in style and/or subsection and cross-reference numbering. If you include an editable version of the draft with your resubmittal, I would be able to redline suggested fixes for these errors.

Sections 20 and 21: Subsection (1) in Section 20 and subsection (3) in Section 21 contain references to the “department of health and human services environmental lab.” Because an “environmental lab” is not a subdivision of the Department of Public Health and Human Services that is recognized in the MCA, codification of a reference to such a subdivision could create a separation of powers issue in the event that the Department reorganizes internally in the future. Consider deleting the term “environmental lab.”

In addition, these sections contain minor errors in style and/or subsection and cross-reference numbering. If you include an editable version of the draft with your resubmittal, I would be able to redline suggested fixes for these errors.

In Section 21, subsection (2)(c) – which should be corrected to subsection (2)(b) – references rules and procedures regarding subcontracting with labs for testing marijuana. The subcontracting relationship seems inconsistent with the licensing framework described Section 7, which suggests that marijuana testing laboratories would be independent licensed entities authorized to contract directly with marijuana manufacturers and producers. Consider clarifying the relationship between the department and the testing laboratories.

Finally, the January 1, 2020 date referenced in subsection (3) of Section 21 should be extended since this initiative would not reach the ballot until November of 2021.

Section 25:

Subsection (2) should be deleted from this section and needs only be included in 50-46-302, MCA. However, the fact that this would add conditions to the list of debilitating medical conditions should be included in the statement of purpose and implication to ensure proper notice to citizens.

Section 27: In Section 27, subsection (6) states “A person may not be prohibited from purchasing, storing, or owning firearms.” As written, this provision would significantly affect the state’s ability to regulate firearms and go well beyond the scope of this initiative’s title/statement of purpose and implication. Article V, section 11, clause 3, of the Montana Constitution provides that bills other than general appropriation bills and bills for the codification and general revision of laws can contain only one subject, clearly expressed in its title. Any portion of an act that falls outside the scope of the subject expressed in the title is void. This "one subject" limitation has been applied to initiatives as well as laws passed by the Legislature. *Montana Auto. Ass'n v. Greely*, 193 Mont. 378, 398, 632 P.2d 300, 311, 1981 Mont. 33.

In order to narrow the provision, you could consider adding a qualifier similar to the language in other subsections of this section, for example, “A person may not be prohibited from purchasing, storing, or owning firearms *solely for conduct allowed pursuant to [sections 1 through 40]*.”

Section 34: This section contains an issue where the sentence structure affects clarity. If you include an editable version of the draft with your resubmittal, I would be able to redline a suggested correction.

Section 42: The language "may not exceed 15%" does not impose a tax. If you would like to impose a tax, it must be expressed as a discrete percentage. Consider substituting language such as "is 15%".

Section 43: Subsection (3)(b) of this section states that the department is authorized to contract with a CPA firm or at least reference an entity licensed under Title 37, chapter 50. The term "CPA firm" should be defined. In addition, please note that this provision is in apparent conflict with the confidentiality provisions expressed in Section 48, which would make it illegal for the Department of Revenue to disclose this type of information, creating potential liability for the Department of Revenue. Further, it is ambiguous whether the Department of Revenue is authorized to examine the listed materials, or whether it *must* contract with a "CPA firm." Consider including a separate sentence or subsection clarifying this issue.

Subsection (5) of this section states that state taxes on the sale of marijuana are exempt from 26 U.S. Code § 280E. This language creates a possible violation of the Supremacy Clause contained in Article VI of the United States Constitution, under which federal law preempts state law. As a result, this provision could be invalidated. The same potential constitutional issue is also present in subsection (2) of Section 57. If the intent is to allow business expenses related to the sale of marijuana, the relevant sections regarding the Montana individual income tax are in Title 15, chapter 30, MCA. See, e.g., 15-30-2110, MCA.

Section 50: I have several notes on subsection (3) of this section:

- I am unaware of a "guaranteed higher education account". If the account does not exist, this is an improper allocation and at a minimum the account should be created in this legislation.
- There is no mechanism for distribution of a "15% property tax credit," and without further direction the provision will not be effective.
- The 10% allocation for "veteran's services" should list an agency where the funds will be utilized.
- Assuming that the "hemp advisory council" refers to the Montana Hemp Advisory Committee appointed by the Department of Agriculture, please note that this is not a legislatively created committee. It would be preferable to refer to "the committee appointed by the department of agriculture to advise on matters related to hemp," to ensure that a separation of powers issue does not arise if the Department of Agriculture does internal reorganization or renaming in the future.

In addition, with regards to subsection (4), Article III, section 4, of the Montana Constitution provides that the "people may enact laws by initiative on all matters *except appropriations of money* and local or special laws" (emphasis added). Because this is a ballot initiative, it is not possible to accomplish a statutory appropriation, so this subsection should be stricken.

Sections 56-70: As described at the beginning of this letter, I am unable to comprehensively review these sections at this time because the format in which the draft was submitted does not include underlining to indicate additions or strike-through to indicate deletions. With that caveat, I noted the following substantive issues that you might consider addressing in the resubmittal.

Section 57: It appears that this section may have been submitted in rough draft form, so it has not been reviewed.

Section 58: As discussed above, the statutory appropriation in Section 50 would be vulnerable to legal challenge and should be removed from the initiative, which would make the inclusion and amendment of 17-7-502, MCA unnecessary.

Section 59: Section 59 is missing from the draft. If this omission was intentional, the subsequent sections and any affected internal cross-references will need to be appropriately renumbered. If this omission was accidental, I would be happy to review Section 59 in your resubmittal.

Sections 63 and 64: Although it is difficult to be sure without striking and underlining, it appears that in Sections 63 and 64, respectively, the penalty for criminal possession with intent to distribute dangerous drugs has been reduced from 20 years to 2 years and the penalty for criminal production or manufacture of dangerous drugs has been reduced from 50 years to 5 years.

Article V, section 11, clause 3, of the Montana Constitution provides that bills other than general appropriation bills and bills for the codification and general revision of laws can contain only one subject, clearly expressed in its title. Any portion of an act that falls outside the scope of the subject expressed in the title is void. This "one subject" limitation has been applied to initiatives as well as laws passed by the Legislature. *Montana Auto. Ass'n v. Greely*, 193 Mont. 378, 398, 632 P.2d 300, 311, 1981 Mont. 33. It is likely that, if challenged, a court would find that the reductions in the criminal penalties in Sections 63 and 64 would fall outside the scope of this initiative's title/statement of purpose and implication because they concern dangerous drugs other than marijuana.

I look forward to reviewing your resubmitted proposed initiative more comprehensively after the codification process from the 2019 legislative session is complete. Once again, this feedback does not touch upon every issue with the initiative, so the response to your resubmittal may include both substantive and stylistic items that have not been addressed here. In the resubmission, please remember to include an editable electronic version with additions underlined and deletions shown as stricken for any sections amending existing law.

Sincerely,

Cori Hach
Staff Attorney

cc: Cory Stapleton, Secretary of State